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Agromate (M) Sdn Bhd v Felcra Niaga Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-1162–08 OF 2020
LEE SWEE SENG, RAVINTHRAN AND HASHIM HAMZAH JJCA
21 JULY 2022

C *Contract — Construction of terms of contract — Payment of interest — Appellant claimed for late payment interest — Whether respondent was contractually bound to pay late payment interest — Whether appellant had waived right to interest — Whether judicial commissioner erred in not giving sufficient emphasis to the pleaded defence*

D

This appeal is about entitlement to the late payment interest on overdue invoices issued for goods sold and delivered. The High Court, after full trial, had dismissed the claim of the appellant for late payment interest. The appellant was a seller of fertiliser and a member of the Fertilizer Industry
E Association of Malaysia ('FIAM'). The respondent was a reseller. It purchased fertiliser for its trade with third parties which were secured through tenders. The parties had dealings with one another since 2016 and maintained a running account. Sometime in 2017, the parties agreed for the goods to be delivered directly to the customers of the respondent after the latter issued
F purchase orders. It was also not disputed that on all the appellant's invoices and delivery orders, the term was printed that an interest of 12%pa would be charged on overdue accounts until full settlement. The respondent did not pay within the 60-day payment period. However, from the year 2016 to May of 2018, the appellant did not issue any invoices to claim late payment interest.
G The claim for late payment interest was first made on 31 May 2018. The appellant issued to the respondent a tax invoice for the sum of RM593,251.20. The sum represented the overdue interest on all the invoiced sums that the respondent failed to pay within the stipulated 60-day period. Thereafter, the appellant continued to issue further invoices to charge the 12% interest per
H annum for the following months. On 8 August 2018, the appellant issued a letter of demand for all the outstanding payments as at 31 July 2018 in the sum of RM10,426,975.27. The respondent paid the sum of RM5,931,349.73. The payment was treated as payment for the principal sum only and not as interest for late payment. On 11 April 2019, another letter was issued by the appellant
I seeking the sum of RM5,931,349.73. The respondent paid a further sum of RM3,293,915.24. The payment was again for the purchase price of the fertilizers and did not include the late payment interest. The appellant instituted legal action on 28 May 2019 to claim the sum of RM1,013,534.10 as outstanding amount as at 15 May 2019 for the purchase price of the goods.

A further sum of RM1,662,197.54 was also claimed for the late payment interest that was allegedly due as at 15 May 2019. The appellant applied for summary judgment. The High Court granted summary judgment in respect of the principal sum of RM1,013,543.10. However, leave to defend was granted in respect of the late payment interest claim of RM1,662,197.54. The trial proceeded only in respect of the latter sum whereby the High Court dismissed the claim of the appellant for late payment interest. Hence, the present appeal by the appellant. The main issue in the appeal was whether the respondent was contractually bound to pay the late payment interest of 12%pa. The second issue was whether the respondent was released from paying the same because the appellant had waived it. The counsel of the appellant had also argued that the learned judicial commissioner did not given sufficient emphasis to the pleaded defence in the judgment.

Held, allowing the appeal with costs:

(1) Instead of denying the existence of an agreement to pay late payment interest or putting up a defence that it was imposed unilaterally, all that the respondent pleaded about it was that the quantum of interest was doubtful or vague and that they had no knowledge how it was calculated. In the premises, the court was of the considered opinion that having regard to the pleaded defence, it was plainly not open for the learned judicial commissioner to determine the case on a defence that was not pleaded, ie, the defence that the respondent did not agree to the imposition of the interest or that it was unilaterally imposed (see paras 11 & 13).

(2) The court was of the view that the learned judicial commissioner erred in finding that the respondent was not bound to pay the late payment interest merely because the letter of the appellant dated 26 February 2018 which gave details of new prices did not mention late payment interest or the FIAM terms and conditions. Even if the said letter could be considered as part of the contract between the parties, it could not be relied upon to insist that the late payment interest term was not applicable. The court also found that the learned judicial commissioner did not adequately consider authorities that held that the failure to object to the interest payment term printed on invoices amounted to acceptance of it. In the premises, the learned judicial commissioner had erred in holding that the late payment interest term in the invoices and delivery orders did not bind the respondent and that it was imposed unilaterally (see paras 17–18, 22, 24 & 28).

(3) There was no mention in the statement of defence of waiver of the right to insist on late payment interest on the part of the appellant. The court examined whether any of the elements of waiver had been otherwise pleaded in one form or another. The court found that not to be the case

either. In the premises, the learned judicial commissioner erred in finding that the defence of waiver applied. In any event, mere delay in issuing invoices on late payment interest without any overt act to indicate it would not be charged could not amount to a waiver. Apart from the fact that waiver was an unpleaded defence, there was no evidence to support the argument that the respondent had altered its position in the goods sold and delivered claim (see paras 33–35).

[Bahasa Malaysia summary

Rayuan ini adalah berkenaan hak faedah pembayaran lewat ke atas invois tertunggak yang dikeluarkan untuk barang yang dijual dan dihantar. Mahkamah Tinggi, selepas perbicaraan penuh, telah menolak tuntutan perayu untuk faedah pembayaran lewat. Perayu adalah seorang penjual baja dan ahli Pertubuhan Industri Baja Malaysia ('FIAM'). Responden adalah penjual semula. Ia membeli baja untuk perdagangannya dengan pihak ketiga yang dijamin melalui tender. Pihak-pihak tersebut telah berurusan antara satu sama lain sejak 2016 dan mengekalkan akaun yang sedang berjalan. Pada tahun 2017, kedua-dua pihak bersetuju agar barangan dihantar terus kepada pelanggan responden selepas mereka mengeluarkan pesanan pembelian. Ia juga tidak dipertikaikan bahawa pada kesemua invois perayu dan pesanan penghantaran, terma telah dicetak bahawa faedah sebanyak 12% setahun akan dikenakan ke atas akaun tertunggak sehingga pembayaran penuh. Responden tidak membayar dalam tempoh pembayaran 60 hari. Bagaimanapun, dari tahun 2016 hingga Mei 2018, perayu tidak mengeluarkan sebarang invois untuk menuntut faedah lewat pembayaran. Tuntutan untuk faedah lewat pembayaran dibuat pada 31 Mei 2018. Perayu telah mengeluarkan kepada responden invois cukai berjumlah RM593,251.20. Jumlah tersebut mewakili faedah tertunggak ke atas semua jumlah invois yang gagal dibayar oleh responden dalam tempoh 60 hari yang ditetapkan. Selepas itu, perayu terus mengeluarkan invois lanjut untuk mengenakan faedah 12% setahun untuk bulan-bulan berikutnya. Pada 8 Ogos 2018, perayu telah mengeluarkan surat tuntutan untuk kesemua bayaran tertunggak pada 31 Julai 2018 berjumlah RM10,426,975.27. Responden membayar sejumlah RM5,931,349.73. Bayaran itu dianggap sebagai bayaran untuk jumlah pokok sahaja dan bukan sebagai faedah untuk pembayaran lewat. Pada 11 April 2019, satu lagi surat telah dikeluarkan oleh perayu menuntut jumlah RM5,931,349.73. Responden membayar sejumlah RM3,293,915.24 lagi. Bayaran tersebut sekali lagi untuk harga pembelian baja dan tidak termasuk faedah pembayaran lewat. Perayu telah memulakan tindakan undang-undang pada 28 Mei 2019 untuk menuntut jumlah RM1,013,534.10 sebagai amaun tertunggak pada 15 Mei 2019 untuk harga pembelian barang tersebut. Sejumlah RM1,662,197.54 lagi telah dituntut untuk faedah pembayaran lewat yang didakwa perlu dibayar pada 15 Mei 2019. Perayu memohon penghakiman terus. Mahkamah Tinggi membenarkan penghakiman terus berkenaan dengan jumlah pokok RM1,013,543.10. Bagaimanapun, kebenaran untuk membela telah diberikan

berhubung tuntutan faedah pembayaran lewat sebanyak RM1,662,197.54. Perbicaraan diteruskan hanya berkenaan dengan jumlah tersebut di mana Mahkamah Tinggi menolak tuntutan perayu untuk faedah pembayaran lewat. Oleh itu, rayuan semasa oleh perayu. Isu utama dalam rayuan adalah sama ada responden terikat secara kontrak untuk membayar faedah pembayaran lewat sebanyak 12% setahun. Isu kedua adalah sama ada responden dilepaskan daripada membayarnya kerana perayu telah mengetepikannya. Peguam perayu juga berhujah bahawa pesuruhjaya kehakiman yang bijaksana tidak memberikan penekanan yang mencukupi kepada pembelaan yang diplidkan dalam penghakiman.

Diputuskan, membenarkan rayuan dengan kos:

(1) Daripada menafikan kewujudan perjanjian untuk membayar faedah pembayaran lewat atau mengemukakan pembelaan bahawa ia telah dikenakan secara unilateral, semua yang diplidkan oleh responden adalah bahawa kuantum faedah adalah diragui atau kabur dan bahawa ianya tidak mempunyai pengetahuan bagaimana ia dikira. Di dalam premis tersebut, mahkamah berpendapat bahawa dengan mengambil kira pembelaan yang diplidkan, adalah jelas tidak terbuka untuk pesuruhjaya kehakiman yang bijaksana untuk menentukan kes bagi pembelaan yang tidak diplidkan, iaitu, pembelaan bahawa responden tidak bersetuju dengan pengenaan faedah atau bahawa ia dikenakan secara unilateral (lihat perenggan 11 & 13).

(2) Mahkamah berpendapat bahawa pesuruhjaya kehakiman yang bijaksana telah terkhilaf apabila mendapati responden tidak terikat untuk membayar faedah pembayaran lewat semata-mata kerana surat perayu bertarikh 26 Februari 2018 yang memberikan butiran harga baharu tidak menyebut faedah pembayaran lewat atau terma dan syarat FIAM. Walaupun surat tersebut boleh dianggap sebagai sebahagian daripada kontrak antara pihak, ia tidak boleh digunapakai untuk menegaskan bahawa tempoh faedah pembayaran lewat tidak terpakai. Mahkamah juga mendapati bahawa pesuruhjaya kehakiman yang bijaksana tidak mempertimbangkan secukupnya otoriti yang memutuskan bahawa kegagalan untuk membantah tempoh pembayaran faedah yang dicetak pada invois adalah terjumlah kepaada penerimaannya. Di dalam premis tersebut, pesuruhjaya kehakiman yang bijaksana telah terkhilaf apabila memutuskan bahawa tempoh faedah pembayaran lewat dalam invois dan pesanan penghantaran tidak mengikat responden dan ia dikenakan secara unilateral (lihat perenggan 17–18, 22, 24 & 28).

(3) Ia tidak dinyatakan dalam pernyataan pembelaan penepian hak untuk mendesak faedah pembayaran lewat di pihak perayu. Mahkamah meneliti sama ada mana-mana unsur penepian telah diplidkan dalam satu bentuk atau yang lain. Mahkamah mendapati ia juga tidak begitu.

Di dalam premis tersebut, pesuruhjaya kehakiman yang bijaksana terkhilaf apabila mendapati pembelaan penepian terpakai. Walau apa pun, sebarang kelewatan dalam mengeluarkan invois atas faedah pembayaran lewat tanpa sebarang tindakan terang-terangan untuk menunjukkan ia tidak akan dikenakan tidak boleh dianggap sebagai penepian. Selain fakta bahawa penepian adalah pembelaan yang tidak diplidkan, tiada bukti untuk menyokong hujah bahawa responden telah mengubah kedudukannya dalam tuntutan barang yang dijual dan dihantar (lihat perenggan 33–35).]

Cases referred to

Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd [1990] 3 MLJ 287, SC (refd)

Bank Islam Malaysia Bhd v Aquasix Corp Sdn Bhd & Ors [2014] 3 MLJ 812, CA (refd)

Caltex Oil Malaysia Ltd v Classic Best Sdn Bhd & Ors [2007] 4 MLJ 772, HC (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124, FC (refd)

Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd [1994] 2 MLJ 353, HC (refd)

Legislation referred to

Rules of Court 2012 O 18 r 8(1)

Appeal from: *Agromate (M) Sdn Bhd v Felcra Niaga Sdn Bhd* [2020] MLJU 1311 (High Court, Kuala Lumpur)

Brian Foong Mun Loong (with Lim Ke Xin) (Chooi & Co + Cheang & Ariff) for the plaintiff.

Norfadilah bt Ahmad (with Nor Shazlina bt Omar) (Rafida Razak & Co) for the defendant.

Ravinthran Paramaguru JCA:

[1] The issue in this case is about entitlement to late payment interest on overdue invoices issued for goods sold and delivered. The High Court, after full trial, dismissed the claim of the plaintiff for late payment interest and hence this appeal. We shall refer to the parties as plaintiff and defendant.

BACKGROUND FACTS

[2] We shall first set out some of the salient background facts as summarised by the learned judicial commissioner. They were not seriously disputed by the

parties. The plaintiff is a seller of fertiliser and a member of the Fertiliser Industry Association of Malaysia (FIAM). The defendant is a reseller. It purchased fertiliser for its trade with third parties which were secured through tenders. The parties had dealings with one another since 2016 and maintained a running account. Sometime in 2017, the parties agreed for the goods to be delivered directly to the customers of the defendant after the latter issued purchase orders.

[3] It is also not disputed that on all the plaintiff's invoices and delivery orders, the following term was printed:

> Interest of 12% per annum will be charged on overdue accounts until full settlement.

The defendant did not pay within the 60-day payment period. However, from the year 2016 to May of 2018, the plaintiff did not issue any invoices to claim late payment interest. The claim for late payment interest was first made on 31 May 2018. The plaintiff issued to the defendant a tax invoice for the sum of RM593,251.20. The invoice stated that the said amount was:

> Being interest on overdue account for the month of June 2018 as per computation attached.

The sum stated actually represented overdue interest on all the invoiced sums that the defendant failed to pay within the stipulated 60-day period. Thereafter, the plaintiff continued to issue further invoices to charge the 12% interest per annum for the following months.

[4] Finally, on 8 August 2018, the plaintiff issued a letter of demand for all the outstanding payment as at 31 July 2018 in the sum of RM10,426,975.27. The defendant paid the sum of RM5,931,349.73. This payment was treated as payment for the principal sum only and not as for interest that was computed for late payment. On 11 April 2019, another letter was issued by the plaintiff seeking the sum of RM5,931,349.73. This time, the defendant paid a further sum of RM3,293,915.24. Again, the payment was for the purchase price of the fertilisers and did not include the late payment interest.

[5] The plaintiff instituted legal action on 28 May 2019 to claim the sum of RM1,013,534.10. This amount represented the outstanding amount as at 15 May 2019 for the purchase price of the goods. A further sum of RM1,662,197.54 was also claimed for the late payment interest that was allegedly due as at 15 May 2019.

[6] The plaintiff applied for summary judgment. The High Court granted summary judgment in respect of the principal sum of RM1,013,534.10. However, leave to defend was granted in respect of the late payment interest

claim of RM1,662,197.54. Thus, the trial proceeded only in respect of the latter sum. There was no further issue in respect of the principal sum as the defendant paid it by the time of trial.

DECISION OF HIGH COURT

[7] The learned judicial commissioner dismissed the claim for the late payment interest in the sum of RM1,662,197.54. His Lordship was mindful that the chargeable interest rate on late payment was printed on the invoices, delivery orders. It was also the plaintiff's case that the FIAM terms and conditions were incorporated into the quotations issued to the defendant in December of 2017. However, the learned judicial commissioner found that the purchase orders were not made pursuant to the said quotations but pursuant to another letter of offer that did not refer to the FIAM terms and conditions. The learned judicial commissioner also found that there was waiver on the part plaintiff since no claim for the late payment interest was made between 2016 and May of 2018. His Lordship held that the waiver was communicated by conduct as no invoice was issued demanding the same prior to May of 2018.

ISSUES IN THE APPEAL

[8] Pithily stated, the learned judicial commissioner dismissed the claim of the plaintiff on the ground that the defendant was not contractually bound to pay for it and because the late payment interest was unilaterally imposed on the defendant. In any event, the learned judicial commissioner said the doctrine of waiver applied. Thus, the main issue in this appeal is the same issue that was tried before the High Court. It is whether the defendant is contractually bound to pay the late payment interest of 12%pa. The second issue would be whether the defendant was released from paying the same because the plaintiff had waived it.

PLEADING POINT

[9] But before we address the issue whether the defendant was contractually bound to pay late payment interest, we shall consider the pleading point raised by counsel for the plaintiff. He argued that the learned judicial commissioner did not give sufficient emphasis to the pleaded defence in his judgment. We find merit in this ground of appeal.

[10] The plaintiff pleaded claim was for money owed for goods sold and delivered. In para 5 of the statement of claim, the plaintiff pleaded that the terms of the supply and delivery of goods were as set out in the delivery orders and invoices and that it includes late payment interest of 12%pa. All the relevant delivery orders and invoices were listed in the statement of claim. The statement of defence is relatively short. It consists of 16 paragraphs. In none of

the said paragraphs, did the defendant dispute the imposition of the late payment interest by the plaintiff. Neither did the defendant raise the defence it was unilaterally imposed on them. Thus, there was no categorical denial in respect of the liability to pay late payment interest. As pointed out by counsel for the plaintiff, what was disputed in the statement of defence with regard to late payment interest was the quantum. Paragraph 12 of the statement of defence is the only paragraph that dealt with the late payment interest. It reads as follows in the original language:

> Defendan juga menafikan sekeras-kerasnya kandungan di perenggan 12 Pernyataan Tuntutan tersebut dan menegaskan jumlah faedah yang dikenakan oleh Plaintif tersebut *adalah meragukan.* Defendan tiada pengetahuan ke atas *jumlah principal yang telah dikenakan faedah tersebut dan Plaintif gagal memberikan kiraan dan tempoh masa yang telah dikenakan faedah*.

[11] Thus, instead of denying the existence of an agreement to pay late payment interest or putting up a defence that it was imposed unilaterally, all that the defendant pleaded about it was that the quantum of interest (jumlah faedah) was doubtful or vague (meragukan) and that they have no knowledge how it was calculated. Furthermore, in para 4 of the statement of defence, the defendant admitted that the parties had dealings and that the transactions between them were subject to invoices and delivery orders. Paragraph 4 reads as follows:

> Merujuk kepada kandungan di perenggan 3, 4 dan 5 Pernyataan Tuntutan tersebut, Defendan mengakui setakat berurusan dengan Plaintif dan terdapat transaksi antara Plaintif dan Defendan tetapi *adalah tertakluk kepada Invois-Invois dan Pesanan Penghantaran yang sebenarnya bagi setiap transaksi tersebut.* (Emphasis added.)

[12] The learned judicial commissioner said that this paragraph must not be read in isolation but must be read together with para 12 that we had referred to earlier. However, as pointed out by counsel for the plaintiff, it is plain that there is no challenge in para 12 in respect of the liability to pay late payment interest. Only the quantum and manner of calculation is disputed.

[13] In the premises, we are of the considered opinion that having regard to the pleaded defence, it was plainly not open for the learned judicial commissioner to determine the case on a defence that was not pleaded, ie the defence that the defendant did not agree to the imposition of the interest or that it was unliterally imposed (see *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196). On this ground alone, we would allow the appeal. Be that as it may, we shall proceed to consider whether the finding of the learned judicial commissioner that the defendant was not bound to pay late payment interest term is correct.

A LIABILITY TO PAY LATE PAYMENT INTEREST

[14] We shall first discuss the ground of the learned judicial commissioner for holding that the plaintiff was not bound by the quotations issued on 4 December 2017, 8 December 2017 and 20 December 2017 (the said quotations). The FIAM terms and conditions with the late payment interest were incorporated into these quotations. The learned judicial commissioner found that the said quotations had expired by the time the defendant ordered goods based on an offer from the plaintiff that was stated in a letter dated 26 February 2018. The prices stated in the letter dated 26 February 2018 differed from that stated in the earlier quotations. There was no mention of the FIAM terms and conditions either. The learned judicial commissioner found as a fact that the defendant relied on the plaintiff's letter dated 26 February 2018 to make the decision to buy fertiliser from the plaintiff. His Lordship said that this is apparent from the internal minutes of defendant's Procurement Committee as well. The minutes of the Procurement Committee did not mention the late payment interest as a term of the contract.

[15] The second reason was as follows. When the plaintiff issued the said quotations, a letter template (the so-called sample letter) was attached to it. It was to be issued by the defendant to its customers. According to PW1 (the senior regional marketing manager of the plaintiff), the object of the sample letter was to inform the customers of the defendant that the plaintiff was a member of the FIAM and all supplies are subject to its terms and conditions. DW1 (the general manager of the defendant) testified that the defendant did not issue letters based on the sample letter to its customers because it was not a member of the FIAM. Thus, for the above reasons, the learned judicial commissioner found that there was no evidence that the terms of the previous quotations which included late payment interest were accepted by the defendant. Instead, the learned judicial commissioner found that the purchase was made under the terms of the letter dated 26 February 2018.

[16] In respect of the argument of the defendant that the late payment interest was printed on the invoices and delivery orders, the learned judicial commissioner said that without anything more, it cannot be said that the defendant accepted it as they were issued after the contract was concluded. Furthermore, the plaintiff did not issue invoices to claim the late payment interest between 2016 and May of 2018. On this point, the learned judicial commissioner referred to his judgment in which he rejected the summary judgment application for the late payment interest that is claimed here. The said judgment was affirmed by the Court of Appeal but no grounds were released. Thus, it is not known on what grounds the decision was affirmed. In any event, the overarching issue would have been whether there was triable issue in respect of the late payment interest.

[17] We are of the respectful view that the learned judicial commissioner erred in coming to the above conclusions and finding that the defendant was not contractually bound to pay the late payment interest. Our reasons are as follows.

[18] We find that the learned judicial commissioner erred in holding that the defendant was not bound to pay late payment interest merely because the letter of the plaintiff dated 26 February 2018 which gave details of new prices did not mention late payment interest or the FIAM terms and conditions. There was evidence that the said letter was issued only to revise the fertiliser prices after negotiation between the parties. And therefore, the said letter which did not mention anything about the payment period or late payment interest should have been viewed as part of a course of dealing between the parties since 2016 in which all the quotations, invoices, delivery orders and statement of accounts mentioned the late payment interest. We refer to this evidence below.

[19] At the trial, it was undisputed that the parties had been dealing with one another since 2016. It was also undisputed that all the pre and post 2018 invoices and delivery orders were printed with the term that late payment interest of 12%pa was chargeable. Moreover, PW1 testified without serious challenge that the only difference between the terms in 2016 and 2018 was the price of the fertiliser. When, DW1 was cross-examined, he agreed that the letter dated 26 February 2018 was about the revised prices of the fertiliser and that it was issued after discussion between the parties. In fact, unlike the previous quotations, the letter dated 26 February 2018 is bereft of any terms of purchase or payment. It only states the new prices and nothing else. By way of comparison, the earlier quotations contained terms of payment including payment period, applicability of FIAM terms and conditions, and reference to government regulations relating to tax, duties and import permit. Therefore, the said letter alone which only mentions prices of fertiliser cannot amount to a complete contract between the parties. It would not be in accord with commercial reality. For that reason, it could not have supplanted the conditions printed on the very invoices and delivery orders which are subject of the late payment interest claim herein.

[20] In fact, it is telling that the internal minutes of the Procurement Committee of the defendant states that the payment period is 60 days. This term is found in the FIAM terms and conditions but is not mentioned in the letter dated 26 February 2018. But curiously, the late payment interest was left out in the minutes of the Procurement Committee. This is clearly selective adoption of the terms and conditions from the previous quotations. The learned judicial commissioner approved the incorporation of the term of 60-day payment period although at the same time he held that the purchase was made pursuant to the letter dated 26 February 2018. His Lordship said as

follows in para 23 of this judgment:

> [23] Clearly, the defendant had not based its acceptance on the quotations but on the Letter. There is nothing in the letter that makes any reference to FIAM T & C 2007. The 60 days' term of payment was a term expressly stated by the Jawatankuasa Perolehan when accepting the plaintiff's letter.

[21] In any event, in our respectful view, it was not proper to rely on the internal minutes of the Procurement Committee of the defendant to find out the applicable terms of the contract as the plaintiff was not privy to the meeting in question. As seen above, the Procurement Committee had selectively incorporated the 60-day payment term but omitted to state anything about late payment interest which had been imposed since 2016.

[22] In the premises, the letter dated 26 February 2018 should not have been considered in isolation. In fact, as we pointed out, it does not even mention the payment period although this is a classic goods sold and delivered transaction. In our view, even if the said letter can be considered as a part of the contract between the parties, it cannot be relied upon to insist that the late payment interest term is not applicable. This is because all the invoices and delivery orders which are the subject of this claim carried the late payment interest term. The parties maintained a running account since 2016. The defendant never raised any issue about the late payment interest term on the invoices or delivery orders after accepting the goods in question and paying the principal sum, albeit after much delay. As we said earlier, even after the defendant was sued, there was no categorical denial about the liability to pay late payment interest in the statement of defence.

[23] The authorities cited by counsel for plaintiff state that in a goods sold and delivered case, the invoices, delivery orders and statement of account collectively constitute the contract between the parties. In the case of *Caltex Oil Malaysia Ltd v Classic Best Sdn Bhd & Ors* [2007] 4 MLJ 772, Suriyadi J (later FCJ) said as follows about the importance of the transaction documents in a goods sold and delivered claim:

> [10] In coming to a decision in cases involving goods sold and delivered such as in this case, I would place due emphasis on the written documents, namely the statement of accounts, invoices, delivery orders, delivery notes and the debit notes. These documents would collectively constitute a contract reduced into writing.

Suriyadi J also cited the goods sold and delivered case of *Pernas Trading Sdn Bhd v Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124 where Salleh Abas FJ (as he then was) said that the sales invoice and the delivery note is the contract that had been reduced to writing.

[24] We are mindful of the argument that the facts of the above case can be distinguished and that in the instant case, the counsel for the defendant argued that the goods were purchased pursuant to the letter dated 26 February 2018. However, as we pointed out from the evidence, it was part of the entire course of dealing between the parties which included invoices and delivery orders. Otherwise, instead of accepting the goods together with the invoices and delivery orders which were printed with the late payment interest, the defendant should have objected by relying on the letter of offer dated 26 February 2018 which contained only revised prices. However, the defendant continued accepting the goods including the invoices and delivery orders without any objection. On this point, we also find that the learned judicial commissioner did not adequately consider authorities that held that failure to object to the interest payment term printed on invoices amounts to acceptance of it.

[25] In *Tansa Enterprise Sdn Bhd v Temenang Engineering Sdn Bhd* [1994] 2 MLJ 353, Haidar J (later CJM) said as follows:

> In respect of the claim of interest of 1.5% per month for overdue accounts by the plaintiff, the defendant cannot deny this claim as it had full knowledge of this as clearly indicated in the invoices submitted to it by the plaintiff and there was no protest of this claim at all when the invoices were presented to the defendant. I am therefore of the view that the plaintiff is entitled to claim such interest. It is similarly not a triable issue at all.

[26] In *Caltex Oil Malaysia Ltd v Classic Best Sdn Bhd & Ors* as well, Suriyadi J held that the failure of the defendant to object to the monthly statements of accounts amounted to the acceptance of the sum stated therein:

> [11] Further in the case of *Syarikat Pakar Kayu dan Perdagangan Sdn Bhd v Maa-sk Sdn Bhd* [1986] 1 CLJ 595, also a case concerning goods sold and delivered, the High Court granted the plaintiffs application for summary judgment on the ground that the defendant had not raised any objection or queries even though detailed particulars of the transactions were provided through the monthly statements of accounts.

[27] In respect of the so-called sample letter, the learned judicial commissioner said that the fact that the defendant did not issue it to their customers meant they did not accept the FIAM terms and conditions. From the terms of the sample letter, it is clear that it was to bind the defendant and its customers to the FIAM terms and conditions. In other words, its purpose was not to bind the plaintiff and the defendant. Therefore, it is totally irrelevant if the defendant did not use the sample letter. The FIAM terms and conditions were in the previous quotations. The late payment interest term was repeated in all the invoices and delivery orders which were acted upon by the defendant as they continued receiving the goods without objection or complaint. Therefore,

it would not also matter that the offer in the previous quotations were not accepted in writing within the prescribed period.

[28] In the premises, we are of the view that the learned judicial commissioner erred in holding that the late payment interest term in the invoices and delivery orders did not bind the defendant and that it was imposed unilaterally.

WAIVER

[29] The learned judicial commissioner ruled that even if the defendant had agreed to the late payment interest stated in the invoices and delivery orders, the plaintiff had waived the right to impose it. Counsel for the plaintiff took the pleading point again in respect of the defence of waiver. We find much merit in it as the defence was not pleaded. The learned judicial commissioner said as follows when finding that the doctrine of waiver would release the defendant from the obligation to pay late payment interest:

> [55] At common law, waiver by estoppel may arise when a party who is entitled to exercise contractual rights, by its conduct leads the other party to believe it will not, so that the other party relies on that representation to its detriment. This principle was established in the case of *Hughes v Metropolitan Railway* (1877) 2 App Cas 439.
>
> [56] In my judgment, the plaintiff had by its conduct in not claiming any late payment interest since 2016 to May 2018 had led the defendant to believe that no late payment interest would in fact be imposed for all the overdue invoices. The defendant had relied upon the representation and is now prejudiced by the plaintiff's decision on 31 May 2018 to claim the late payment interest retrospectively.

[30] Thus, learned judicial commissioner found waiver by estoppel on the part of the plaintiff as they did not enforce the late payment interest claim between 2016 and May of 2018. Counsel for the plaintiff referred us to O 18 r 8(1) of the Rules of Court 2012 and some case authorities. He argued that a plea of waiver must be specifically pleaded. Order 18 r 8(1) reads as follows:

> 8 Matters which shall be specifically pleaded (O 18 r 8)
>
> (1) A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —
>
> (a) *which he alleges makes any claim or defence of the opposite party not maintainable*;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading. (Emphasis added.)

[31] By raising the argument of waiver, the defendant has said that the claim is not maintainable or in other words that they had been released from their contractual obligation. In the premises, the defendant is statutorily enjoined to plead waiver under the above-mentioned rule. This point has been addressed in many cases. It suffices if we mention two cases here. In *Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 3 MLJ 287, Gunn Chit Tuan SCJ said as follows in the Supreme Court:

> Estoppel in any special form especially by conduct or by representation was not specifically pleaded in the statement of defence as the plaintiff should have done so under O 18 r 8(1) of the Rules of the High Court 1980, because it is a material fact which would take the opposite party by surprise and raise issues of fact.

[32] In *Bank Islam Malaysia Bhd v Aquasix Corp Sdn Bhd & Ors* [2014] 3 MLJ 812, the Court of Appeal also dismissed the defence of waiver as it was not pleaded.

[33] We have scrutinised all the 16 paragraphs of the statement of defence. There is no mention of waiver of the right to insist on late payment interest on the part of the plaintiff. We have also troubled to examine whether any of the elements of waiver have been otherwise pleaded in one form or another. We find that not to be the case either. In the premises, we are of the view that the learned judicial commissioner erred in finding that the defence of waiver applied in this case.

[34] We shall now examine, whether in any event, the learned judicial commissioner was right in holding that there was waiver on the facts of this case. The learned judicial commissioner said that he found waiver by conduct because PW1 said that he did not issue invoices to seek payment of late payment interest in respect of overdue sums on the invoices issued prior to 31 May 2018. However, PW1 also emphatically said that the defendant had delayed considerably in making the principal payment and the defendant was never told that the late payment interest would be waived. Furthermore, the parties maintained a running account. Therefore, mere delay in issuing invoices on late payment interest without any overt act to indicate it would not be charged cannot amount to waiver.

[35] The learned judicial commissioner also said that the fact that the plaintiff did not issue invoices between 2016 and May of 2018 on late payment interest caused the defendant to alter its position by reordering its affairs. However, the defendant never gave any evidence as to how it reordered its financial affairs by not paying interest on late payments of which it had notice from the beginning of the contractual relationship. Therefore, apart from the

fact that waiver was an unpleaded defence, we find that there is no evidence to support the argument that the defendant had altered its position in this goods sold and delivered claim.

CONCLUSION

[36] In conclusion, we find that the learned judicial commissioner committed an error of law in considering the unpleaded defences of unilateral imposition of late payment interest and the defence of waiver. We find that His Lordship also erred in holding that the letter dated 26 February 2018 was the document that constituted the contract between the parties without giving sufficient consideration to the other critical documents such as the previous quotations, invoices, delivery orders and statements of accounts. In the premises, we are constrained to disturb the decision of the High Court. The decision of the High Court is unanimously set aside and the appeal is allowed. There will be judgment for the plaintiff in accordance with prayer 14(b) of the statement of claim. The defendant to pay costs of RM50,000 here and below to the plaintiff which shall be subject to allocatur.

Appeal allowed.

Reported by Mohd Kamarul Anwar